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# Return to Sender: Reconsidering Prisoner Correspondence under Article 8 in *Dankevich v.* Ukraine

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# Return to Sender: Reconsidering Prisoner Correspondence under Article 8 in *Dankevich v. Ukraine*

## I. INTRODUCTION

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> (“Convention”) protects a wide range of rights.<sup>2</sup> Apart from its general applicability to the citizenry of a member state, Article 8 also limits the state’s power in the prison context.<sup>3</sup> *Dankevich v. Ukraine*<sup>4</sup> examined a member state’s limitations on prisoner correspondence.<sup>5</sup> However, the European Court of Human Rights (“ECHR”) found Ukraine in violation of Article 8 without a complete Article 8 analysis.<sup>6</sup>

Given the context of prisoner treatment in *Dankevich*, the ECHR’s Article 8 analysis should have embraced principles articulated in international instruments on prisoner rights. While its holding was correct, the ECHR offered only cursory analytical support for its defense of prisoner rights of correspondence.<sup>7</sup> As a result, future interpretations of correspondence limitations for prisoners under Article 8 remain ambiguous. This Note analyzes the shortcomings in *Dankevich* and explores how stronger support for its holding may be found.

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1. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, May 6, 1963, 213 U.N.T.S. 221 [hereinafter Convention for the Protection of Human Rights].

2. LUKE CLEMENTS ET AL., EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION 176-186 (2d ed 1999).

3. See EUROPEAN COMMISSION OF HUMAN RIGHTS CASE-LAW TOPICS, HUMAN RIGHTS IN PRISON 20 (1971). Most prisoner cases dealing with Article 8 deal with the censoring of correspondence. See, e.g., *Klamecki v. Poland*, App. No. 31583/96, 39 Eur. H.R. Rep. 7 (2003).

4. *Dankevich v. Ukraine*, App. No. 40679/98, 38 Eur. H.R. Rep. 25, 542 (2003).

5. *Id.*

6. *Dankevich* at 576.

7. *Id.*

Part II provides the factual background for the *Dankevich* case. Part III describes the three prongs of an Article 8 analysis and the ECHR's application of that analysis in *Dankevich*. Part III.A examines the first prong of the Article 8 analysis ("in accordance with the law") and considers an alternative test for the prison context. In Part III.B, this Note examines the second prong ("necessary in a democratic society") and offers other international instruments on prisoner rights as sources to strengthen the ECHR's position. Part III.C covers the third prong (legitimate aims) and discusses its waning significance in Article 8 analysis in the context of prisoner rights of correspondence. Finally, Part IV offers some concluding remarks on the *Dankevich* opinion.

## II. FACTS OF THE CASE

On April 3, 1997, Mr. Yuriy Oleksandr Dankevich was convicted of three counts of murder and one count of attempted murder.<sup>8</sup> His conviction carried a death sentence, and he was subsequently imprisoned to await his execution after further appeals.<sup>9</sup>

By the end of 1997, Mr. Dankevich filed a final request of clemency with the President of Ukraine.<sup>10</sup> His mother and wife also attempted extraordinary appeals with the Supreme Court of Ukraine.<sup>11</sup> The President declared a moratorium on all state executions.<sup>12</sup> In 1999, the Constitutional Court held that capital punishment contradicted Ukraine's Constitution and commuted all death sentences into life imprisonments.<sup>13</sup>

While Mr. Dankevich's execution was under consideration, the government detained him in two separate facilities.<sup>14</sup> Mr. Dankevich filed a petition with the European Commission of Human Rights arguing that his treatment in prison violated Articles 3, 8, and 13 of the Convention.<sup>15</sup>

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8. *Id.* at 548.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 549. Mr. Dankevich stayed at Zaporizhie Prison no. 2 for three years before moving to Zaporizhie Prison no. 1. *Id.*

15. *Id.* at 542.

During his detention, three sets of laws controlled his right of correspondence.<sup>16</sup> The first two laws were the Correctional Labour Code (“the Code”), which covered general detention conditions for all prisoners, and an Instruction (“the Instruction”), which determined the conditions of prisoners subject to capital punishment.<sup>17</sup> Since Mr. Dankevich was a prisoner and for a time subject to capital punishment, both of these laws applied.<sup>18</sup>

These laws determined Mr. Dankevich’s conditions until July 11, 1999 when a new set of laws called the Temporary Provisions took effect.<sup>19</sup> Compared with the Instruction, the Temporary Provisions lessened restrictions on prisoners subject to capital punishment.<sup>20</sup> The ECHR found that the Code and the Instruction both violated Article 8, but the Temporary Provisions did not.<sup>21</sup>

In its Article 8 analysis, the ECHR discussed prison regulations on the applicant’s incoming and outgoing correspondence.<sup>22</sup> Article 8(1) of the Convention states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”<sup>23</sup> Article 8(2) limits the government’s ability to interfere with this right to the extent that there is a legitimate aim that is “in accordance with the law and is necessary in a democratic society.”<sup>24</sup>

The ECHR found the Instruction and the Code in violation of Article 8 because Ukraine did not publish the Instruction and did not draft the Code with enough precision.<sup>25</sup> The ECHR upheld the Temporary Provisions on the ground that it advanced a legitimate

16. *Id.* at 574.

17. *Id.* at 558-59, 574. Articles 41 and 43 of the Correction Labour Code provided for the correspondence restrictions of prisoners. *Id.* at 558-59. The Instruction was “issued by the Ministry of Justice, the Prosecutor General and the Supreme Court. *Id.* at 574.

18. *Id.* at 574.

19. *Id.* at 575. See *infra* note 25. Apparently, in an effort to be more compliant with the Convention for the Protection of Human Rights, Ukraine modified its prison regulations. *Id.* at 562.

20. *Id.* at 556.

21. *Id.* at 574-76.

22. *Id.* at 573.

23. Convention for the Protection of Human Rights, *supra* note 1, art. 8(1).

24. Convention for the Protection of Human Rights, *supra* note 1, art. 8(2).

25. The Court found a violation of Article 8 from September 11, 1997 to July 11, 1999 and found no violation after July 11, 1999. *Dankevich* at 577. The effective date of new prison regulations on Mr. Dankevich’s correspondence explains the time difference in finding violations. *Id.* at 575.

aim.<sup>26</sup>

### III. ANALYSIS FOR DETERMINING AN ARTICLE 8 VIOLATION

To determine a violation under Article 8, the ECHR applies a three-prong test.<sup>27</sup> Article 8(2) of the Convention states:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>28</sup>

Accordingly, to justify a restriction on any of the rights guaranteed in Article 8(1), the court must find that the restriction: (1) is in accordance with the law; (2) is necessary in a democratic society; and (3) has any of the legitimate aims listed in Article 8(2).<sup>29</sup>

The ECHR applied the first prong of the above test to two different sets of laws.<sup>30</sup> It also applied the third prong to a new set of laws that came into effect during Mr. Dankevich's prison term.<sup>31</sup> However, the ECHR discussed these prongs only to a very limited extent.<sup>32</sup> Thus, a case that fully applies the Article 8 test to prison correspondence regulations remains to be seen, despite a growing body of international instruments on the subject. Subsequent interpretations of prisoner correspondence restrictions under Article 8, therefore, have received little foundation from *Dankevich*. Moreover, a deeper discussion would have helped to avoid the analytical discrepancies inherent to the prison context.

Part III analyzes how a thorough Article 8 analysis would have strengthened the ECHR's holding. Furthermore, this part offers alternate factors that are implied from other international instruments and would also serve as a stronger basis for protecting the right of correspondence and monitoring its restriction on the

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26. *Id.* at 575-76.

27. Convention for the Protection of Human Rights, *supra* note 1, art. 8(2).

28. Convention for the Protection of Human Rights, *supra* note 1, art. 8(2).

29. *Id.*

30. *Dankevich* at 573-75.

31. *Id.* at 575-76.

32. *Id.* at 574-76.

imprisoned.

### A. "In Accordance with the Law"

The first prong in Article 8 analysis is three-fold: (1) the law must have "some basis in domestic law,"<sup>33</sup> (2) the law must be accessible (i.e., published), and (3) the law must be understandable enough for one to know which of his actions might foreseeably apply to the law.<sup>34</sup> Using parts of this test, the ECHR examined all three laws that applied to Mr. Dankevich's prison conditions.<sup>35</sup> The Instruction and the Code both failed on different grounds; respectively, the failure to publish the law (which affects accessibility) and poor drafting of the law (which limits foreseeability).<sup>36</sup>

#### 1. Basis in Domestic Law

To meet this element, the law in question must first be included somewhere in the body of domestic law.<sup>37</sup> The ECHR defined this element in *Huvig v. France*.<sup>38</sup> In *Huvig*, the ECHR determined that case law ("unwritten law") and statutes ("written law") both comprise the empowered law of the land.<sup>39</sup> Enactments at various levels of government (e.g., agencies) are also considered law but are of "lower rank than statutes."<sup>40</sup>

The *Huvig* decision recognized the difference in common law and civil law traditions (the law of "Continental" countries, as

33. *Id.* at 574.

34. *Kruslin v. France*, 176 Eur. Ct. H.R. (ser. A) 6, 20 (1990).

35. *Dankevich* at 574-76.

36. *Id.* at 575-76.

37. *Huvig v. France*, 176-B Eur. Ct. H.R. (ser. A) 39, 52 (1990). Earlier ECHR case law closely examined what the meaning of "law" was within the Convention for Protection of Human Rights. *Id.* at 53. The ECHR has stated that an analysis of the "in accordance with the law" language of Article 8(2) should be identical to the "prescribed by law/*prevues par la loi*" language of Article 10(2). *Silver v. United Kingdom*, 61 Eur. Ct. H.R. (ser. A) at 32-37 (1979). "Indeed, this must be so, particularly because the two provisions overlap as regards freedom of expression through correspondence and not to give them an identical interpretation could lead to different conclusions in respect of the same interference." *Id.* at 33.

38. *Huvig* at 53-54.

39. *Id.* See also *The Sunday Times v. United Kingdom*, 30-A Eur. Ct. H.R. (ser. A) at 31 (1979). Perhaps a helpful way to understand this distinction is that "unwritten" laws are non-legislatively drafted laws while "written" laws are drafted by the legislature.

40. *Huvig* at 53-54.

*Huvig* refers to it) and accordingly emphasized the need to embrace all legal traditions within the ECHR's interpretation of Article 8.<sup>41</sup> The result is a broad interpretation of what is incorporated into the scope of this element.<sup>42</sup>

In *Dankevich*, the ECHR did not address the question of whether the laws were "enactments of law."<sup>43</sup> Since the laws were adopted and passed properly, the laws seemingly satisfy this element without obstacle.<sup>44</sup>

After determining whether the enactment is a "law" under Article 8, the inquiry then focuses on whether the government's interference in the individual's right of correspondence has some "basis in domestic law."<sup>45</sup> This subsequent analysis is trivial when considered alongside the above analysis, and is only clarified through the next two elements.<sup>46</sup>

Overall, however, this element is too broad. In an effort to include enactments of law by all levels of government, the ECHR now classifies almost anything as having a "basis in domestic law." The breadth of this element presents no controversy for any Article 8 challenge.

## 2. Accessibility of the Law

A law is adequately accessible if it is a published work or available to the citizenry.<sup>47</sup> Although this element seemingly contradicts the ECHR's position that "unwritten" laws have a basis in the law,<sup>48</sup> the ECHR clarified that even unwritten case law is often accessible through published sources.<sup>49</sup> The Instruction failed to satisfy this element because it was circulated internally

41. *Id.*

42. See generally P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 765-767 (3d ed., Kluwer Law International 1998).

43. *Dankevich* at 573-75.

44. *Id.* at 573-75. Specifically, the Ministry of Justice, the Prosecutor General, and the Supreme Court issued the Instruction on April 20, 1998. *Id.* at 554, 574. The Temporary Provisions were enacted on June 25, 1999. *Id.* at 556.

45. VAN DIJK & VAN HOOF, *supra* note 42, at 767.

46. *Id.* at 767-68 ("[T]he principle [of an interference having basis in domestic law] is rather trivial and it has, consequently, been qualified in the case-law so as to include [the foreseeability and accessibility] requirement[s].").

47. *The Sunday Times v. United Kingdom*, 30-A Eur. Ct. H.R. (ser. A) at 31 (1979).

48. *Huvig v. France*, 176-B Eur. Ct. H.R. (ser. A) 39 at 53-54.

49. *The Sunday Times*, 30-A Eur. Ct. H.R. at 31.

within government offices and was not available to the public.<sup>50</sup> Indeed, the deciding factor for the ECHR in finding an Article 8 violation here was the lack of accessibility.<sup>51</sup>

The purpose of the second element is to ensure that citizens at large (i.e., the persons immediately subject to the law) can readily obtain the law.<sup>52</sup> However, the fact that the very persons immediately subject to the law—prisoners—are not in the public at large complicates the analysis.<sup>53</sup> To get around this complication, the ECHR in *Dankevich* implied a dual accessibility requirement for regulations impacting prisoners.<sup>54</sup>

However, dual accessibility as the ECHR understands it produces a contradictory result. Prison administrators in *Dankevich* posted the rights and obligations of prisoners throughout their prison sentence.<sup>55</sup> Thus, persons immediately subject to the law (prisoners) had access—albeit short access—to the prison rules.<sup>56</sup> Nevertheless, since the public did not have access to these prison rules, the ECHR determined that the accessibility element was not met.<sup>57</sup> Prisoners need access to the laws since laws immediately impact them; at the same time, the public needs access to the laws in order to keep the government accountable.<sup>58</sup> Presumably, if prisoners were mistreated while imprisoned under laws only accessible to prisoners, the public would still demand reform and prisoners would still be informed of their limited rights.<sup>59</sup> On the other hand, laws fully accessible to the public at large but not to prisoners might keep prisoners uninformed of restrictions on their rights. Indeed, how does dual

50. *Dankevich* at 575. The ECHR simply stated that the Code met the accessibility requirement without discussing the reasons and did not mention accessibility in its discussion about the Temporary Provisions. *Id.* at 574-76.

51. *Id.* at 575.

52. *The Sunday Times*, 30-A Eur. Ct. H.R. at 31.

53. *Dankevich* at 575.

54. *Id.* at 574-75.

55. *Id.* at 549-51.

56. *Id.*

57. *Id.* at 575.

58. See *The Sunday Times v. United Kingdom*, 30-A Eur. Ct. H.R. (ser. A) at 31 (1979).

59. Prisoner family members and prisoner rights organizations (e.g., Amnesty International) monitor prison regulations to ensure humane treatment and would lobby for reform if the laws were too restrictive. See Amnesty International, <http://www.amnesty.org>.



accessibility benefit the rights of prisoners any more?

If prison officials kept Mr. Dankevich fully informed of the prison rules at all times while the laws themselves were not published to the public, could a violation still be found? The ECHR seems to imply that public access to prison regulations is more important than prisoner access. Mr. Dankevich read the laws that affected his daily activities, but this access by itself was not enough to meet the requirement. By the ECHR's reasoning, a law is not accessible if the public cannot obtain it, even if the persons most immediately affected by it can.

If the goal of accessibility is keeping the individuals who are immediately subject to the law informed of it, then mandatory internal distribution in prison, along with public availability of prison regulations upon request, would strike a better balance between the rights of prisoners and public accountability. The public has an interest in prisoner treatment; accordingly, it has an interest in these laws and should have access to them. Thus, under this analytic model, published laws necessarily would have a presumption of public access,<sup>60</sup> while unpublished laws would shift the burden onto the government to prove adequate accessibility where the public makes a request. However, it is prisoners themselves who must have constant and complete access to the law. The ECHR's discussion lacked a thorough analysis of accessibility needs for the public and for prisoners. This deficiency may cause ambiguities for future cases applying Article 8 to prisoner correspondence.

### 3. Foreseeability of the Law

The foreseeability requirement asks whether one can regulate one's conduct and foresee the legal consequences of one's actions.<sup>61</sup> The ECHR has recognized that most laws necessitate a degree of flexibility that makes absolute foreseeability impossible.<sup>62</sup> The focus of this requirement, therefore, as expressed in *Dankevich*, rests on proper drafting of the law.<sup>63</sup> The Code failed the foreseeability element because the text of the rules was

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60. See *The Sunday Times*, 30-A Eur. Ct. H.R. at 31.

61. *Id.*

62. *Id.*

63. *Dankevich* at 574-75. For an example of imprecise statute drafting, refer to *Kruslin v. France*, 176 Eur. Ct. H.R. (ser. A) 6, 22-25 (1990).

poorly written and did not clearly indicate whether the rules applied to prisoners serving death sentences.<sup>64</sup>

Article 8's foreseeability analysis, however, provides no real safeguard for prisoners because *all* of their actions are limited.<sup>65</sup> Upon detention, a prisoner anticipates that prison authorities will monitor and control everything that a prisoner does. Only the most ambiguous laws will cause uncertainty about foreseeable consequences. In Mr. Dankevich's case, it was unclear whether he was allowed a specific number of parcels or whether he was prohibited from receiving parcels at all.<sup>66</sup> Undoubtedly, prison officials would limit his correspondence one way or another.

If foreseeability merely requires proper statutory drafting, as *Dankevich* suggests,<sup>67</sup> then the Convention falls short of protecting prisoners' interests. The ECHR missed a chance to refine its explanation of foreseeability and ensure a modest legal safeguard for prisoners. The analysis should determine whether a prisoner fully comprehends the extent of limitations while detained. Appropriate measures might include reading of the written rules for those who are illiterate<sup>68</sup> and a discussion of prison rules and regulations during prisoner orientation.<sup>69</sup>

64. *Id.* at 574-75. The ECHR did not discuss foreseeability for the Instructions or the Temporary Provisions.

65. See generally Stephen Livingstone, *Prisoners' Rights in the Context of the European Convention of Human Rights*, 2 PUNISHMENT & SOCIETY 309, 312 (2000). The Convention for the Protection of Human Rights was based on the norm of "a democratic society of autonomous and equal individuals who participate in both public and private life." *Id.* Prisoners, in comparison, live in an environment where their rights (liberty, privacy, and movement) are systematically denied; thus, the Article 8 analysis immediately proceeds to the three-prong test. *Id.* An insightful and related discussion on the doctrine of "inherent limitations" where certain rights are inherently limited based on a person's status (including prisoner status) is in VAN DIJK & VAN HOOFF, *supra* note 42, at 763-65.

66. *Dankevich* at 574-75.

67. *Id.*

68. Literacy rates for Ukraine are at 99.7%. CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK UKRAINE, <http://www.cia.gov/cia/publications/factbook/geos/up.html> (2005). However, the statistic counts as literate those individuals over the age of 15 who can read and write. *Id.* It is unclear what level of literacy is needed to understand the laws that apply to prisoners.

69. Of particular note is Ukrainian authorities who state that educating prisoners "appreciably contributes to . . . their social adaptation after release and the prevention of recidivism." ROY WALMSLEY, FURTHER DEVELOPMENTS IN THE PRISON SYSTEMS OF CENTRAL AND EASTERN EUROPE: ACHIEVEMENTS, PROBLEMS AND OBJECTIVES 514, <http://www.heuni.fi/24705.htm> (2003). Further, Ukraine has continuing efforts to increase the level of education in prisons by implementing secondary education facilities. Response

Overall, the test of whether the regulations are "in accordance with the law" is better upheld by a principle of transparency whereby prisoners upon detention have immediate access to regulations that limit their freedoms. As a secondary matter, the rules should be also available to the public at large to protect society's interest in maintaining humane prison conditions that comply with human and legal rights.<sup>70</sup>

### B. "Necessary in a Democratic Society"

The second element needed to justify a restriction of freedoms under Article 8 is that the restriction must be "necessary in a democratic society."<sup>71</sup> Any restriction must correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued."<sup>72</sup> Sometimes this standard is described as a test of proportionality in which interference with freedoms by a public authority must be both minimal and justified.<sup>73</sup>

"The scale the [ECHR] utilises seems to imply that the more far-reaching the infringement or the more essential the aspect of the right that has been interfered with, the more substantial or compelling the legitimate aims pursued must be."<sup>74</sup> In the context of prison regulations, the balancing test must be carefully made to protect both the government's interest in keeping dangerous individuals apart from society and the prisoner's interest in enjoying fair treatment.<sup>75</sup>

The *Dankevich* opinion only addressed this point for the

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of the Ukrainian Government to the Report of the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (2004), <http://www.cpt.coe.int/documents/ukr/2004-35-inf-eng.htm>.

70. The public maintains an interest in the administration of prisons by the government. See Suzanne M. Bernard, *An Eye For an Eye: The Current Status of International Law on the Human Treatment of Prisoners*, 25 RUTGERS L.J. 759 (1994).

71. *Silver v. United Kingdom*, 61 Eur. Ct. H.R. (ser. A) at 37-38 (1979).

72. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. at 22-23 (1976).

73. CLARE OVEY & ROBIN C.A. WHITE, JACOBS & WHITE, EUROPEAN CONVENTION ON HUMAN RIGHTS 209 (3rd ed. 2002).

74. VAN DIJK & VAN HOOFF, *supra* note 42, at 537.

75. See *Rees v. United Kingdom* 106 Eur. Ct. H.R. (ser. A) at 15 (1987) ("fair balance that has to be struck between the general interest of the community and the interests of the individual"). In other words, under the "necessary in a democratic society" requirement, the government must show that the restriction allows a way for it to assert its interest (the necessity branch) and protect the individual (the implied "demonstrability" branch) at the same time. *Id.*

Temporary Provisions, by holding that the government had an interest in regulating the volume of correspondence at prisons.<sup>76</sup> The ECHR's discussion was a factual recitation of prison conditions that favored the Ukraine's discretion over undertaking a full balancing test analysis in which that discretion might very well have been limited.<sup>77</sup> This cursory analysis was not enough. Failure to elaborate on this element may disadvantage future interpretations of correspondence under Article 8. It is not unusual for the ECHR to refer to international instruments beyond the Convention to help decide its case.<sup>78</sup> In fact, a substantial set of international instruments exists that supports a balancing test for prisoner rights.<sup>79</sup>

Many of these instruments apply a similar balancing test and offer special nuances in the contours of the right of correspondence for imprisoned persons;<sup>80</sup> as such, the ECHR should have referred to these instruments for guidance. Two of the most important international instruments addressing prisoner treatment are provided below.

76. *Dankevich* at 573-76.

77. *Id.* at 575-76. The ECHR allowed Ukraine a margin of appreciation in regulating prison life. See generally HOWARD CHARLES YUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 92-95 (1996) (discussing prisoners rights under Article 8 and the doctrine of the margin of appreciation).

78. *X. and Y. v. Switzerland*, App. No. 8166/78, 13 Eur. Comm'n H.R. Dec. & Rep. 241, 243 (1978) (citing to the Standard Minimum Rules for the Treatment of Prisoners). See also CLEMENTS ET AL., *supra* note 2, at 183 ("This is, however, an area where the Court and Commission have shown a willingness to adapt their views in line with prison reform and changing public attitudes.").

79. Bernard, *supra* note 70, at 764.

80. A related body to the ECHR is the European Committee for the Prevention of Torture ("ECPT"). The ECPT also has standards apart from the ECHR. For a discussion on the ECPT's relationship to the ECHR, read WOLFGANG PEUKERT, *PROTECTING PRISONERS: THE STANDARDS OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE IN CONTEXT* 86-102 (Rod Morgan & Malcom D. Evans eds., 1999). Another related international instrument is the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173 76th plenary meeting 9 December 1988, Principle 19. Principle 19 states that "[a] detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations." *Id.* Also, see the United Nations ("UN") Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res. 45/113, art. 59-62, Annex, 45 U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49 (Dec. 14, 1990) (giving a broader explanation for the rights of correspondence).

1. *Universal Declaration of Human Rights ("UDHR") Article 12.*<sup>81</sup>

The UDHR is universal (at least in theory) and has been in existence since 1948.<sup>82</sup> As the most general starting point of international instruments, the UDHR supplies some of the most recognized articulations of human rights.<sup>83</sup> For over fifty years, the UDHR has been a document of unprecedented status.<sup>84</sup> The most relevant article of the UDHR for the purposes of this Note is Article 12. Article 12 creates a similar right of correspondence as articulated in Article 8 of the Convention.

Article 12 states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."<sup>85</sup>

The language of Article 12 implies that all persons bear inherent rights concerning privacy, family, home and correspondence.<sup>86</sup> These rights cannot be abridged by a government's "arbitrary interference."<sup>87</sup> If it occurs, all people have "the right to the protection of the law," meaning that the law must permit individuals to remedy the interference.<sup>88</sup>

The UDHR states broad principles and is neither as detailed as an international convention would be, nor is it legally binding on signatories in the same way that treaties or conventions are.<sup>89</sup> Accordingly, the definition of "arbitrary interference" is left vague and may encompass any interference, including non-governmental interference. This Note conceives of the UDHR as a floor below which national and other supranational laws cannot fall.<sup>90</sup>

81. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. Doc. A/810, art. 12 (1948) [hereinafter UDHR].

82. See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (1999).

83. See generally Anne F. Bayefsky, *The Legacy of the Universal Declaration of Human Rights*, 5 ILSA J. INT'L & COMP. L. 261 (1999).

84. MORSINK, *supra* note 82, at xii.

85. UDHR, *supra* note 81.

86. MORSINK, *supra* note 82, at 134.

87. *Id.*

88. *Id.* at 134-39.

89. *Id.* at 15; Bernard, *supra* note 70, at 769.

90. See also International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 7, 17, 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171,

For prisoners, the UDHR supports the balancing test in Article 8 of the Convention. While no guidance may be available as to the meaning of “arbitrary interference,” the UDHR still supports the idea that even prisoners have inherent rights of correspondence that cannot be denied.

2. *United Nations Standard Minimum Rules for the Treatment of Prisoners* (“SMRTP”), Rules 27 and 37<sup>91</sup>

Apart from general principles of human rights articulated in the UDHR, model prison standards comprise an area of “soft law”<sup>92</sup> that influences the creation of prison rules.<sup>93</sup> Unlike other areas of international law, no international convention covers prisoner treatment or prisoner rights exclusively.<sup>94</sup> Given this void, model standards dealing with prisoner treatment are particularly important.

The SMRTP is the most significant of the model standards that deal with the treatment of prisoners.<sup>95</sup> The purpose of the

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entered into force Mar. 23, 1976, [hereinafter CCPR]. Construing the prisoners’ right of correspondence under the CCPR should be the same as for the UDHR since the language of the CCPR tracks the language of the UDHR. *Id.* CCPR’s Article 7 has the exact same language as UDHR’s Article 5, and CCPR Article 17 has the same language as UDHR’s Article 12. *Id.* Unlike the UDHR, however, the CCPR has an optional protocol which provides an additional mechanism for enforcement for signatory countries that have signed onto it. Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. A/RES/57/199 (Dec. 18, 2002). Under the Optional Protocol, an individual whose rights have been violated by a signatory state and whose domestic remedies have been exhausted may make submissions to the CCPR committee. *Id.* The signatory state must then address the violation to the committee’s satisfaction.

91. U.N. Dep’t of Econ. & Soc. Affairs, First U.N. Cong. on Prevention of Crime & Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/6/1 E.S.C. (May 13, 1977) available at <http://www.ohchr.org/english/law/treatmentprisoners.htm> [hereinafter SMRTP].

92. BLACK’S LAW DICTIONARY 1426 (8th ed. 2004) defines “soft law” in the international law context as “[g]uidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding.” See also Tadeusz Gruchalla-Wesierski, *A Framework for Understanding Soft Law*, 30 MCGILL L.J. 37 (1984). For a discussion on the difference between “soft” international law and “hard” international law, see Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT’L L.J. 405 (2003).

93. Jiri Toman, *Quasi-Legal Standards and Guidelines for Protecting Human Rights*, GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 203 (Hurst Hannum ed., 3d ed., Transnational Publishers 1999).

94. Bernard, *supra* note 70, at 770-71.

95. *Id.*

SMRTP is to encourage countries to adopt standard provisions within their own penal codes.<sup>96</sup> It provides for the minimum conditions for prisoner treatment.<sup>97</sup> Rule 37 provides for the right of correspondence subject to "necessary supervision."<sup>98</sup> "[N]ecessary supervision" is qualified by the necessity test in rule 27, which limits restrictions on prison life only to what is necessary to maintain discipline and order.<sup>99</sup>

SMRTP Rule 27 provides: "[D]iscipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life."<sup>100</sup> This rule supports the general principle of maintaining order with the least restriction needed.<sup>101</sup> It is similar to Article 8's balancing test because the state cannot make restrictions beyond a minimal level of necessity.<sup>102</sup>

Rule 37 states that "[p]risoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits."<sup>103</sup> This rule deals specifically with a prisoner's right of correspondence. Here, the language is also one of where the government must show enough necessity ("necessary supervision") to fulfill the supervision required for prison.<sup>104</sup>

The "necessary in a democratic society" prong of the Article 8 balancing test deserves a deeper analysis in light of other influential international instruments on prisoner rights.<sup>105</sup> Not only would it strengthen the legitimacy of the Convention's interpretation concerning prisoners, it would also enhance the understanding of correspondence rights for prisoners.

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96. Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners*, 10 J. INT'L L. & ECON. 453 (1975).

97. SMRTP, *supra* note 91, rule 2.

98. SMRTP, *supra* note 91, rule 37.

99. SMRTP, *supra* note 91, rule 27.

100. *Id.*

101. See COMM'N ON CORRECTIONAL FACILITIES & SERV., AMERICAN BAR ASS'N, ANALYSIS OF EXTENT OF APPLICABILITY OF THE UN STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS TO COMMUNITY-BASED SUPERVISION AND RESIDENTIAL CARE FOR CONVICTED OFFENDERS 12-13 (1974).

102. *Id.*

103. SMRTP, *supra* note 91.

104. *Id.*

105. See *X. and Y. v. Switzerland*, *supra* note 78 and accompanying text.

### C. Legitimate Aims

The third prong of Article 8 is whether the government has a legitimate aim.<sup>106</sup> Legitimate aims listed in Article 8(2) are:

national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>107</sup>

In the context of prisons, the usefulness of this analysis is questionable because the government will always have a legitimate interest in detaining criminals and maintaining order within prisons.<sup>108</sup> The deference extended to governments in meeting this prong is so broad that it is unlikely that the ECHR will reject the government's assertion that it is advancing a legitimate aim.<sup>109</sup> The focus, then, shifts to whether the legitimate aim is necessary to the democratic society (i.e., a second prong analysis).<sup>110</sup>

In *Dankevich*, the ECHR never applied the legitimate aims analysis to the Instruction and the Code because these laws violated the first prong of Article 8.<sup>111</sup> However, even though the

106. Convention for the Protection of Human Rights, *supra* note 1, art. 8(2).

107. *Id.*

108. See generally, VAN DIJK & VAN HOOFF, *supra* note 42, at 539. Typically, in the context of prison regulations, the legitimate aim advanced by the government is the "prevention of disorder or crime." For examples of Member States using the legitimate aim of preventing disorder or crime, see *Klamecki v. Poland*, App. No. 31583/96, 39 Eur. H.R. Rep. 7, 165 (2003), and *De Wilde, Ooms and Versyp v. Belgium* (No. 1), 1 E.H.R.R. (ser. A) 373 (1970).

109. A few examples include: *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 1 (1982); *Buckley v. United Kingdom*, 23 E.H.R.R. 101 (1996); *Laskey, et al. v. United Kingdom* 1997-I Eur. Ct. H.R. 120; *Gaskin Case*, 160 Eur. Ct. H.R. (ser. A) at 1 (1989). As an aside, this deference is akin to the U.S. Supreme Court's rational basis test. See Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 132-33 (2004) ("In other words, courts generally should presume that laws are constitutional. As the Court has noted, a 'more searching judicial inquiry' is appropriate when a law interferes with individual rights, restricts the ability of the political process to repeal undesirable legislation, or discriminates against a 'discrete and insular minority.'" (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938))).

110. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 1 (1982); *Buckley v. United Kingdom*, 23 E.H.R.R. 101 (1996); *Laskey, et al. v. United Kingdom* 1997-I Eur. Ct. H.R. 120; *Gaskin Case*, 160 Eur. Ct. H.R. (ser. A) at 1 (1989).

111. *Dankevich* at 574-76. Similarly, in *Niedbala v. Poland*, App. No. 27915/95, 33 Eur.



ECHR ruled that the Temporary Provisions had a legitimate aim of preventing disorder and crime, it mainly discussed the second prong.<sup>112</sup>

Two problems arise because this element is rarely discussed in relation to prisoners. The first problem deals with the second prong's dependence on the legitimate aim. Proportionate measures must be balanced with the legitimate aim of the government.<sup>113</sup> It follows that the more legitimate the government's aim is, the more likely that the measures will be justified.<sup>114</sup> However, if a legitimate aim will always pass muster to a minimal degree, then the government always wins half the analysis on the way to proving proportionate measures.<sup>115</sup> Thus, even minimally legitimate aims allow the government to pursue some sort of restrictive measure. The only hurdle for the government to overcome is to prove that the restrictions are not overly extensive.

Second, if an element of Article 8 is always met, then that element becomes a non-issue for any applicant seeking ECHR relief.<sup>116</sup> The automatic upholding of a government's legitimate aims defeats the purpose of this prong. After all, every government action ought not to deserve legitimacy at every occasion of disregard.<sup>117</sup> In fact, the very idea of judicial review implies distrust of government actions which must be monitored and checked.<sup>118</sup>

The ECHR should revive its inspection of the legitimate aims analysis in order to fully credit its usefulness in Article 8. *Dankevich* was an opportunity to examine the legitimate aims

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H.R. Rep. 48, the ECHR did not discuss the second and third prongs after finding that the law did not meet the first prong.

112. *Dankevich* at 576.

113. See discussion, *infra* Part II.B.

114. See, e.g., *Smith v. United Kingdom*, 1999-VI Eur. Ct. H.R. 45.

115. VAN DIJK & VAN HOOFF, *supra* note 42, at 539 (In the context of a prisoner, "the Contracting State may be confronted here with less a severe and less probing attitude on the part of [the ECHR].").

116. VAN DIJK & VAN HOOFF, *supra* note 42, at 539.

117. See VIVIEN HART, *DISTRUST AND DEMOCRACY* (1978).

118. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101-103 (1980). However, in rebuttal to this Note's criticisms of the "legitimate aims" prong, there is an argument that since the judiciary is an inherently undemocratic institution, it is improper for it to question excessively the aims of a democratically elected government, particularly where those aims are not inherently unconstitutional.

analysis that the ECHR did not take. It may have discussed whether the interests of preventing disorder or crime are equivalent for prisoners and the general public. It may have also examined the interplay between the protection of rights of others (like non-detained family members of prisoners) with the rights of prisoners and how this relationship affects the right of correspondence, such as whether the limited correspondence rights of prisoners concomitantly limit correspondence rights for outsiders that want to contact prisoners.<sup>119</sup> Because of the ambiguities in analyzing the legitimate aims prong as well as its growing irrelevance, the ECHR failed to bring guidance for the right of correspondence for prisoners under Article 8. As a result, subsequent cases may suffer from these deficiencies.

#### IV. CONCLUSION

At present, prisoners file more than half of all individual complaints made to the ECHR.<sup>120</sup> When one also considers that the initial scope of the Convention was for citizens at large functioning in public and private spheres, one can understand the greater care which the ECHR must exercise when defining the limitation of rights under Article 8.<sup>121</sup>

Despite the proper outcome for Mr. Dankevich, the ECHR was not careful enough to protect future interpretations of correspondence limitations under Article 8. The ECHR should have narrowed both the requirements of finding a domestic law basis and legitimate aims to enhance their relevance in the analysis. The ECHR should have defined foreseeability and accessibility for the circumstances of prisoners as well. The test of finding legitimate government aims also seems meaningless in this context. Finally, numerous international instruments on prisoners' rights offer sufficient support and uniformity for the ECHR to consider them, especially under its "necessary in a democratic society" analysis. *Dankevich* was a missed opportunity for the

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119. This Note raises but a few of the many questions that relate to legitimate aims in the prisoner context.

120. Livingstone, *supra* note 65, at 309-10; Toman, *supra* note 93, at 205. See EUROPEAN COMMISSION OF HUMAN RIGHTS CASE-LAW TOPICS, *supra* note 3, at 20 (early statistics on prisoner applicants reached 40% by 1971).

121. Livingstone, *supra* note 65, at 309.

ECHR to clarify prisoner rights of correspondence.

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